89-417

No. ___



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NEW JERSEY,

*Petitioner,*

v.

RICHARD J. BOLTE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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September 1989

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## QUESTION PRESENTED FOR REVIEW

Whether, consistent with this Court's decisions in *Warden v. Hayden*, 387 U.S. 294 (1967) and *United States v. Santana*, 427 U.S. 38 (1976), a police officer in continuous "hot pursuit" of a fleeing suspect who has consciously and recklessly eluded the officer, thereby posing a risk to the public safety, may follow that person into his home, which was entered for the apparent purpose of avoiding apprehension, and effect a warrantless arrest for numerous motor vehicle and disorderly persons offenses committed by the suspect in the officer's presence?

## PARTIES BELOW

The parties below, the State of New Jersey, by its Attorney General, Peter N. Perretti, Jr., and respondent Richard J. Bolte, remain parties to this petition.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Petitioner, State of New Jersey, by its Attorney General, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey, entered in the above-entitled proceeding on July 12, 1989.

### OPINIONS BELOW

The oral opinion of the Superior Court of New Jersey, Law Division (Sullivan, J.S.C.) is not reported. It is reprinted as Appendix A, p. 1a, *infra*.

The written opinion of the Superior Court of New Jersey, Appellate Division (Long, J.A.D.), is reported at 225 N.J. Super. 335, 542 A.2d 494 (App. Div. 1988) and is reprinted as Appendix D, p. 22a, *infra*.

The written opinion of the Supreme Court of New Jersey is reported at 115 N.J. 579, 560 A.2d 644 (1989) and is reprinted as Appendix F, p. 30a, *infra*.

## JURISDICTION

The Judgment of the Supreme Court of New Jersey was entered on July 12, 1989. This petition has been filed within sixty (60) days of that date. Rule 20.1, Rules of the Supreme Court. Although respondent has yet to be tried in state court, the suppression ruling challenged herein constitutes a "final judgment" within the meaning of 28 U.S.C. §1257(3) and this Court has jurisdiction over the case. *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

## FEDERAL CONSTITUTIONAL PROVISION INVOLVED

### United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

This case presents this Court with the opportunity to address a significant issue left open by the Court's holdings in *Welsh v. Wisconsin*, 466 U.S. 740 (1984) and *Payton v. New York*, 445 U.S. 573 (1980), namely, the permissible scope of warrantless in-home arrests in the course of hot pursuit of violators of the law by the police. More particularly, this Court is squarely

presented with the question of whether, under the rationale of *Warden v. Hayden*, 387 U.S. 294 (1967), and *United States v. Santana*, 427 U.S. 38 (1976), continuous hot pursuit by a police officer of a suspect who violates motor vehicle and disorderly persons offenses in a police officer's presence, and who poses a threat to public safety in his attempt to elude the police, justifies warrantless entry into the suspect's home to effect that person's arrest. Attempts to resolve this legal issue have resulted in a conflict of authority in various jurisdictions.

The facts of this case are undisputed and were essentially stipulated to in the trial court. They are reported in detail in the opinion of the Superior Court of New Jersey, Appellate Division (App.D, at pp. 23a-24a).

At approximately 1:40 a.m. on April 6, 1987, Patrolman William E. Liss, Jr. of the Moorestown, New Jersey Police Department was on routine patrol when he observed a 1986 four-door Lincoln Continental. The driver and sole occupant of the Lincoln was later identified as respondent, Richard J. Bolte. Liss followed the Lincoln for approximately one mile on Tom Brown Road and observed the Lincoln weave out of its lane two feet onto the shoulder of the road, then another three feet onto the grass. The Lincoln turned at the intersection of Westfield Road and headed south. At this point, Liss activated his emergency lights and siren to alert the driver to stop the Lincoln. The Lincoln did not stop. Liss followed the Lincoln on Westfield Road for approximately six-tenths of a mile with the emergency lights and siren on. During this time, he observed respondent look into his rear view mirror and ignore the presence of the patrol

vehicle. The Lincoln turned right onto Stanwick Glen Road, travelled approximately 200 feet and made lefts onto Sentinel Road, Deerfield Terrace, Eagle Brook Drive, and back onto Stanwick Glen Road to complete a circle of the neighborhood. After completing this route, the Lincoln repeated it, with increasing speed each time, for a total of four tours of the neighborhood. The speed ranged from 20 miles per hour to approximately 48 miles per hour, and according to Liss, as the speed increased, the operation of the vehicle became more erratic. On the fourth lap around the neighborhood, the Lincoln entered the driveway of 511 Eagle Brook Drive. The garage door was opened, apparently automatically, and the Lincoln drove into the garage. Liss followed the car and exited his patrol car in the driveway. He entered the garage just as the automatic garage door started to close and respondent got out of the Lincoln. Liss asked respondent to open the garage door, but respondent continued on his way and entered the house. Liss followed the respondent into the house and advised him that he was under arrest. Respondent continued to ignore the officer's request and continued to walk through the house. He then ran up the stairs and entered what appeared to be a bedroom and attempted to close the door. Patrolman Liss followed, was able to keep the door from closing and continued to advise the respondent that he was under arrest. Finally, with the assistance of backup officers from the Moorestown Police Department, Liss was able to arrest the respondent in the residence. Respondent was handcuffed and taken to the station for processing. He was subsequently charged with numerous motor vehicle and disorderly persons violations.

Respondent filed a suppression motion in the Superior Court of New Jersey, Law Division, seeking to invalidate his warrantless arrest. The law division judge denied respondent's motion, finding that acceptance of respondent's position would encourage violators of the law to flee from police. (App. A, at p. 17a).

Respondent filed an interlocutory appeal of the denial of his suppression motion with the Superior Court of New Jersey, Appellate Division. The appellate division granted respondent leave to appeal and reversed the decision of the trial court, finding that respondent's warrantless arrest violated the Fourth Amendment. *State v. Bolte*, 225 N.J. Super. 335, 542 A.2d 494 (App. Div. 1988). (App. D, at p 22a).

The State of New Jersey then filed an interlocutory appeal with the New Jersey Supreme Court. The supreme court subsequently granted the State leave to appeal. 113 N.J. 661, 552 A.2d 181 (1988). (App. E, at p. 29a). On July 12, 1989, the court affirmed the judgment of the appellate division, holding that respondent's arrest violated the fourth amendment. 115 N.J. 579, 560 A. 2d 644 (1989). (App. F, at p. 30a).

The State of New Jersey now petitions this Court for review of the judgment of the Supreme Court of New Jersey.

## REASON FOR GRANTING THE WRIT

**This Court Should Resolve the Conflict in Legal Authority as to Whether the Court's Holdings in *Warden v. Hayden* and *United States v. Santana*: A) Permit a Suspect Who Commits "Minor" Offenses in a Policeman's Presence to Defeat his Arrest by Escaping into a Private Place and B) Require a Reviewing Court to Consider All Consequences of the Suspect's Conduct, Including his Eluding of the Police and the Threat to Public Safety Created Thereby, in Evaluating the Constitutional Validity of the Suspect's Warrantless Arrest.**

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court held that, absent exigent circumstances, a warrantless nighttime entry into the home of an individual to arrest him for a civil, nonjailable traffic offense was violative of the Fourth Amendment. *Id.* at 754. The New Jersey Supreme Court, finding itself to be "significantly influenced" by *Welsh*, found the police officer's conduct in this case to be unconstitutional. (Appendix F, at p. 48a). In so doing, the court below gave insufficient consideration to the distinctions between respondent's case and the facts of *Welsh*, distinctions which serve to validate the officer's arrest of respondent in respondent's home. The court also gave no consideration to the nature of respondent's conduct as it impacted upon respondent's fourth amendment claims. In short, respondent's arrest was the reasonable culmination of a continuous pursuit created exclusively by respondent's voluntary illegal and hazardous behavior. Respondent's warrantless arrest did not offend the constitutional standard of reasonableness.

*Welsh v. Wisconsin, supra*, did not involve a law enforcement officer's "hot pursuit" of a suspect.

While a claim of "hot pursuit" was made, this Court found this assertion "unconvincing because there was no immediate or continuous pursuit of the [defendant] from the scene of a crime." *Id.* at 753. In contrast, respondent's case is clearly one in which "hot pursuit" was present. Nor is there any question regarding the police officer's authority to immediately arrest respondent for offenses which were committed in the police officer's presence.

The "hot pursuit" rule is an established exception to the warrant requirement. *United States v. Santana*, 427 U.S. 38 (1976); *Warden v. Hayden*, 387 U.S. 294 (1967). "[A] suspect may not defeat an arrest which has been set in motion in a public place, . . ., by the expedient of escaping to a private place." *United States v. Santana*, 427 U.S. at 43. The warrantless arrest of respondent, which had its origins outside of respondent's home on a public road, was reasonable. *State v. Wren*, 115 Idaho 618, 768 P.2d 1351, 1354 (Ct. App. 1989). "[W]hen a citizen has knowingly placed himself in a public place and valid police action is commenced in that public place, the citizen cannot thwart that police action by then fleeing into a private place." *Edwards v. United States*, 364 A.2d 1209, 1214 (D.C. App. 1977).

While both *Hayden* and *Santana* involved fleeing felons, there is nothing in either opinion which suggests, nor does logic dictate, that the "hot pursuit" exception to the warrant requirement can never apply in cases involving "minor" offenses. Indeed, this Court could easily have evidenced such an intent by dismissing as legally irrelevant the state's claims of "hot pursuit" in *Welsh v. Wisconsin, supra*, but, instead, chose only to decide that "hot pursuit" had

not been demonstrated under the facts of *Welsh*. 466 U.S. at 753. The State of New Jersey suggests that, in an appropriate factual setting, the "hot pursuit" doctrine can and should be used to validate a warrantless arrest of a suspect in his home, regardless of the seriousness of the underlying offense.[1] The case before this Court presents such a factual setting.

Underlying the rationale which would permit "hot pursuit" warrantless entries into residences of suspects racing to evade police attempts to detain them is the policy of compliance with police directives to facilitate the efficient administration of law enforcement and protection of the public, regardless of the nature or seriousness of the offense involved. *See, e.g.*, N. J. Stat. Ann. 2C:29-2 (in "resisting arrest" prosecution, it is not a valid defense that the police officer

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[1] The New Jersey Supreme Court disposes of this Court's *Santana* rationale by issuing the generality that *Santana* has been "interpreted to apply only to the pursuit of fleeing felons." Appendix F, at p. 41a). The court's statement is both an overgeneralization and mischaracterization of the state of the law. While some states have interpreted *Santana* in such a restrictive fashion, other jurisdictions have not acknowledged the major/minor offense distinction in this context. *See, e.g., People v. Hampton*, 209 Cal.Rptr. 905, 911, 164 Cal. App. 3d 27 (Cal. App. 1985), *cert. denied* 474 U.S. 825 (1985) (*Santana* applied to misdemeanor drunk driving); *City of Kirksville v. Guffey*, 740 S.W.2d 227, 228-229 (Mo. App. 1987), *cert. denied* 108 S.Ct. 1596 (1988) (same); *Stark v. Department of Motor Vehicles* 483 N.Y.S.2d 824,826, 104 N.Y.A.D. 194 (App. Div. 1984), *aff'd*, 65 N.Y. 2d 720, 492 N.Y.S.2d 8, 481 N.E. 2d 548 (Ct. App. 1985) (same); *People v. Odenweller*, 527 N.Y.S.2d 127, 130, 137 N.Y.A.D. 15 (App. Div. 1988) (same); *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835, 837 (Neb. 1978) (same); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271, 275 (Neb. 1987), *cert. denied* 108 S. Ct. 285 (1987).

was acting unlawfully in making the arrest); N.J. Stat. Ann. 39:5-25 (police officer may make an arrest for a motor vehicle violation pursuant to any act that is committed in his presence). At respondent's suppression hearing, the trial court observed: "I think [respondent] had a duty to stop and if we award [sic] him by allowing him to evade the police by what he attempted to do we would be encouraging other people to do the same thing, which would be very, very much contrary to public policy." (App. A, at p. 17a). A more detailed version of the trial court's theory is set forth in *State v. Blake*, 468 N.E.2d 548 (Ind. App. 1984), which, in affirming a "hot pursuit" warrantless arrest of a defendant in his home, announced:

> Such a result is mandated by necessity and good sense. Law enforcement is not a child's game of prisoners base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot. A police officer in continuous pursuit of a perpetrator of a crime committed in the officer's presence, be it a felony or a misdemeanor, must be allowed to follow the suspect into a private place, or the suspect's home if he chooses to flee there, and effect the arrest without a warrant. A contrary rule would encourage flight to avoid apprehension and identification, even at dangerously high speeds as here, with the natural destruction of evidence accomplished while the officer interrupted his pursuit to obtain a warrant. [*Id.* at 553]

The same message is most emphatically stated in *Gasset v. State*, 490 So.2d 97 (Fla. App.), *rev. denied* 500 So.2d 544 (1986):

> [Defendant] waived any expectation of privacy he may have had in his garage by engaging in the high-speed chase previously described and leading the officers directly to the place of his arrest. The enforcement of our criminal laws, including serious traffic violations, is not a game where law enforcement officers are "it" and one is "safe" if one reaches "home" before being tagged.
>
> * * *
>
> [Defendant's] actions in this case were of sufficient gravity to justify the *de minimus* intrusion involved here. He jeopardized his own safety, the safety of the officers, and that of the general public. By his own actions, he cast aside any fourth amendment shield which might have served to protect him. We will not erect one for him now. [*Id.* at 98-99 (footnote and citations omitted)]

Similarly, in the case at bar, respondent, as a result of his unlawful and unsafe behavior, "had forfeited his right to retreat behind the closed door of his 'castle' and bar peace officers from entering." *State v. Owens*, 102 N.J.Super. 187, 200, 245 A.2d 736, (App. Div. 1968), *aff'd as modified* 54 N.J. 153, 254 A.2d 97 (1969), *cert. denied* 396 U.S. 1021 (1969).

In a case decided only a year after *Welsh*, this Court rejected a rule which would determine the constitutional propriety of police apprehension of suspects based solely upon the potential penalties

attendant to the offense for which a defendant was being pursued. *Tennessee v. Garner*, 471 U.S. 1 (1985). This Court noted that, at present, the distinction between felonies and "minor" offenses is itself minor and often arbitrary. As a result, the assumption that a felon is more dangerous than a "minor" offender has been rendered untenable. *Id.*, 471 U.S. at 14. "Indeed, numerous misdemeanors involve conduct more dangerous than many felonies." *Ibid.*[2]

Such is the case with the offenses for which respondent in this case was being pursued, despite their classification by the New Jersey Supreme Court as "minor." Respondent, well aware of the police officer's legitimate attempts to stop him for a violation of motor vehicle laws, fled the scene in his car and proceeded to drive "laps" around a residential neighborhood, during which his speed more than doubled, from 20 miles per hour to 48 miles per hour. As respondent's speed increased, his operation of the automobile became more erratic, to the point where he was weaving from curb to curb and sliding around corners as he eluded the police. By mere fortuity, respondent did not injure himself or another motorist or pedestrian as he raced through the streets of Moorestown. Clearly, respondent created a high risk of danger to the public safety, as well as jeopardized the safety of the pursuing officer, which legitimized the police officer's actions in apprehending him.

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[2] Of particular significance to this case is the example provided by the Court in *Garner*, *i.e.*, that white-collar crime, a more "serious" offense in terms of attendant penalities, poses a less significant physical threat than drunken driving. *Id.* at 14 n.12. (citing *Welsh v. Wisconsin*).

Utilization of a major/minor offense distinction to govern the legitimacy of warrantless in-home arrests following hot pursuits is both unwise and unworkable. As recognized by Justice White:

> The decision to arrest without a warrant typically is made in the field under less-than-optimal circumstances; officers have neither the time nor the competence to determine whether a particular offense for which warrantless arrests have been authorized by statute is serious enough to justify a warrantless home entry to prevent the imminent destruction or removal of evidence. [*Welsh v. Wisconsin*, 466 U.S. at 761 (White, J., dissenting)]

If the ultimate purpose of fourth amendment standards is to keep police practices within constitutional limits, "this purpose is not served by a rule which cannot be applied correctly with a fair degree of consistency by well-intentioned police officers." LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 6.1(f) at 599 (2d Ed. 1987).

"An arrest occurs when it is communicated, not when the officer decides to take such action. No particular acts, words or formulaic expressions are required[.]" *State v. Wren, supra*, 768 P.2d at 1359 n.8. In the case *sub judice*, the policeman's attempt to stop the automobile was clearly communicated; respondent was quite aware of the patrolman's efforts. *Contrast, Michigan v. Chesternut*, 108 S. Ct. 1975, 1980 (1988) ("The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt[.]") It is also obvious

that no "planned" arrest took place. Nothing in this record suggests that the police arrested respondent in his home to conduct an exploratory search or for any other previously contemplated ulterior motive. Indeed, no search was conducted; respondent was apprehended and immediately removed from his house. Furthermore, the police did not create the scenario that prompted respondent to go to his bedroom. The patrolman's act of following respondent upstairs was a reasonable consequence of respondent's own voluntary choice to go to his bedroom.

The need for a warrant and the legality of a defendant's arrest should not turn on the entirely fortuitous circumstance of a suspect's proximity to his home when he violates the law in the presence of the police or on his ability to outrun (or outdrive) the police to reach his residence. At the core of respondent's legal argument and the New Jersey Supreme Court's acceptance of that argument is the premise that the constitutionally-protected expectation of privacy one enjoys in one's residence acts to invalidate the type of police intrusion which occurred in this case. The State of New Jersey does not, of course, question the sanctity with which the Constitution treats individuals' homes, but only the lower court's refusal to acknowledge that respondent, by his own voluntary conduct, forfeited such constitutional protection.

"An expectation of privacy does not give rise to Fourth Amendment protection, . . ., unless society is prepared to accept that expectation as objectively reasonable." *California v. Greenwood*, 108 S. Ct. 1625, 1629 (1988). *And see Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("[I]t would, of course, be merely

tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimization of expectations of privacy by law must have a source outside of the fourth amendment, either by reference to concepts of real or personal property law or to *understandings that are recognized and permitted by society.*") (emphasis added). Society has not and will not accept as reasonable any assertion of an expectation of privacy in the confines of one's home which acts to both validate the dangerous conduct exhibited by respondent in this case and thwart law enforcement efforts to expeditiously deal with such a situation.

Given the facts of his case, respondent's privacy expectations were wholly unreasonable under the constitutional analysis which determines the extent, if any, of the fourth amendment protection to be afforded to him. Prior to respondent's apprehension inside his residence, Officer Liss had attempted to effectuate a legitimate roadside stop of respondent's vehicle. Respondent, ignoring Liss' display of legal authority, embarked on a dangerous vehicular journey through the streets of Moorestown. Even after arriving at his home, respondent refused to heed the patrolman's commands to stop. It is noteworthy that, although faced with respondent's wild driving, the officer's first reaction when respondent finally pulled into his garage and shut the garage door was to ask respondent to open the door, presumably in order that Liss could deal with respondent *outside*. Only when respondent ignored this request (as he had done with all others) did the patrolman enter respondent's home on the heels of respondent himself. Under these cir-

cumstances, invalidation of respondent's arrest merely because it did not involve a "serious" offense creates an illogical and anomalous situation: respondent's noncompliance with police instructions and successful elusive behavior necessitate that a warrant be obtained to apprehend him while no warrant would have been required if he simply had obeyed the officer's initial commands to stop. The "hot pursuit" of respondent and respondent's unsafe behavior in eluding the police in a motor vehicle serve to legitimize respondent's arrest.

Other factors serve to distinguish respondent's case from *Welsh v. Wisconsin*. In *Welsh*, this Court was careful to point out that Wisconsin had chosen to treat a first offense for driving while intoxicated as a "noncriminal, civil forfeiture offense for which no imprisonment [was] possible." *Id.* at 754. The Court then held that "[*g*]*iven this expression of the State's* [*minimal*] *interest*, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id.* (emphasis added). While there is an indication that the Court's focus on penalties attendant to offenses may have recently shifted in this context (see pp. 10-11 *supra*, discussing *Tennessee v. Garner*), even assuming that this analysis remains legitimate, New Jersey's penalties for the offenses with which respondent was charged are far higher than those considered in *Welsh*.[3] *Welsh* has

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[3] The New Jersey Supreme Court, referring to the State's (Burlington County Prosecutor's) concession at the appellate division level that Officer Liss did not have probable cause to believe that respondent was driving while intoxicated, did not factor this offense into the group of violations it was considering

been distinguished by courts of other jurisdictions on the ground that the penalties for the underlying offense in their states were far greater than those in Wisconsin at the time *Welsh* was decided. *Stark v. N.Y. State Dept. of Motor Vehicles, supra*, 483 N.Y.S.2d at 826; *People v. Odenweller, supra*, 527 N.Y.S.2d at 129; *City of Kirksville v. Guffey, supra*, 740 S.W.2d at 229; *Bennett v. Coffman*, 361 S.E.2d 465, 470 (W. Va. S. Ct. 1987); *Gasset v. State, supra*, 490 So.2d at 98; *State v. Komoto*, 697 P.2d 1025, 1033 (Wash. App.), *cert. denied* 474 U.S. 1021 (1985); *State v. Ellinger*, 725 P.2d 1201, 1204 (Mont. 1986). At the critical time, the maximum penalty for a first d.w.i. offense in Wisconsin was a $200 fine. *Welsh, supra* at 746. In terms of custodial exposure alone, the allowable first-offender punishment for the offenses respondent committed in the officer's presence prior to his apprehension in his house are as follows: eluding a police officer (N.J. Stat. Ann. 2C:29-2b) 6

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for purposes of determining the validity of respondent's arrest. The court ignored without comment the fact that while the State, as represented by the county prosecutor's office, did make such a concession before the appellate division, the State, as represented by the Attorney General before the New Jersey Supreme Court, disputed such a concession. An objective view of the facts should lead to a determination that the extreme nature of respondent's initial erratic driving, his flight (indicating a consciousness of guilt) and the manner of his flight (racing in a residential neighborhood, sliding around corners) were sufficient to establish probable cause for the offense of driving while intoxicated. In any event, the remaining offenses committed by respondent also in the presence of police independently justify his warrantless arrest. Particularly, the offense of eluding a police officer is a much more serious transgression, in terms of custodial exposure alone, than the offense of driving while intoxicated in New Jersey. See *infra* p. 16

months; reckless driving (N.J.Stat. Ann. 39:4-96) - 60 days; driving while intoxicated ( N.J.Stat. Ann. 39:4-50) - 30 days; speeding (N.J. Stat. Ann. 39:4-99) - 15 days; failure to maintain a single lane (N.J. Stat Ann. 39:4-88b) - 15 days; disorderly conduct (N.J. Stat. Ann. 2C:33-2a) - 30 days. The State would suggest that when a defendant amasses a variety of violations during his encounter with, and attempt to flee from, police (as respondent has done here), it is entirely appropriate to consider the aggregate penalty available in determining the "extent of the State's interest in arresting" individuals suspected of committing those offenses. *Welsh, supra* at 754 n.14. As a result of the extent of his penal exposure for these offenses, respondent does not have the luxury of benefitting from the "minor offense" reasoning in *Welsh*.

Safety considerations also justified the warrantless arrest in this case. Upon being confronted by police, respondent had undertaken a highly dangerous form of activity. Under all the circumstances presented to him, the patrolman could reasonably believe that he was dealing with a very unstable individual who posed a threat to the public in the streets and who could be a danger to both himself and anyone else in the house. *People v. Hampton, supra* at 910-911. Immediate apprehension of respondent was therefore imperative.

The New Jersey Supreme Court's contrary conclusion, *i.e.*, that "the facts of this record do not demonstrate that there was a serious threat to public safety in the course of Officer Liss' pursuit of [respondent]" (App. F, at p. 51a), reflects a crabbed evaluation of the relevant factual circumstances, *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985), and is

plainly wrong. Respondent utilized a dangerous instrumentality (a motor vehicle erratically travelling at high speeds) to effectuate his escape. The severe threat to public safety at every corner of respondent's route is obvious. Surely, Patrolman Liss need not have waited for respondent to have actually injured another motorist or pedestrian before he was entitled to follow respondent into the residence.

The possibility of respondent's escape from the home if not immediately detained was also present. From his initial awareness that the police were attempting to stop him on the roadway to his eventual arrest at home, respondent did nothing but endeavor to elude the police. Therefore, the potential for respondent's departure from his home if the police had terminated their pursuit to obtain a warrant was great. As for any argument that the house could have been secured and a warrant obtained,

> [t]hat involves a large measure of speculation, depending upon a variety of factors relating to the feasibility of "surrounding" the house or otherwise preventing escape, including the size of the house, the number of exits, the proximity of the house to cover for a person bent on escape, visibility, etc. In the exigencies of the moment, the officers could not reasonably be expected to put fine weights on the scale in weighing the chances of securing the house or of losing their quarry. [*State v. Girard*, 276 Or. 511, 555 P.2d 445, 447 (1976).]

In sum, the continuous hot pursuit of respondent by police, the potential penalties for the offenses he

committed and the threat to public safety which he created in this case require a declaration that respondent's warrantless arrest was valid.

The Superior Court of New Jersey, Appellate Division, had chastised Patrolman Liss for undertaking what the appellate division viewed as "a perilous course of action which violated the sanctity of [respondent's] home for absolutely no good reason." (App. D, at p. 28a). What the appellate division, and subsequently the New Jersey Supreme Court, failed to consider was that if anyone here engaged in a "perilous course of action," it was respondent himself. There are numerous situations that arise in law enforcement that are unique and call for a special response. Faced with the unique circumstances of respondent's outrageous conduct, Officer Liss responded in an entirely reasonable and appropriate fashion. The Supreme Court of New Jersey itself embarks on a perilous course in that the restrictions it imposes are unrealistic, unreasonable and potentially life-threatening in future cases where police officers are forced to pursue violators of the law who now have incentive to speed away to their homes and flout legitimate commands to stop. The New Jersey Supreme Court's failure to recognize the reasonableness of the patrolman's actions requires reversal of the court's judgment.

## CONCLUSION

Based upon the foregoing, petitioner urges this Court to grant this petition for a writ of *certiorari* to consider whether the rationale of *United States v. Santana, supra*, which prevents a defendant from defeating a legitimate arrest which has been set in mo-

tion in a public place by merely escaping to a private place, applies whether the underlying offenses for which a suspect is being pursued are felonies or misdemeanors.

Review by this Court is warranted to settle the law on this significant issue and to correct the erroneous ruling of the Supreme Court of New Jersey.

Respectfully submitted,

PETER N. PERRETTI, JR.
Attorney General Of New Jersey
*Attorney For Petitioner*

BORIS MOCZULA
Deputy Attorney General
*Attorney of Record*

BORIS MOCZULA
Deputy Attorney General
Division of Criminal Justice
*Of Counsel and on the Petition*

DATED: September 1989

# APPENDIX

## APPENDIX A

SUPERIOR COURT OF NEW JERSEY
BURLINGTON COUNTY - LAW DIVISION
MUNICIPAL COMPLAINT NO. MC-415-87
STATE OF NEW JERSEY,

-V-

RICHARD BOLTE,

*Defendant.*

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**STENOGRAPHIC TRANSCRIPT**
**OF**
**PROCEEDINGS**

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**Motion to Suppress**

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Burlington County Courts Facility
Mount Holly, New Jersey 08060
Date: Friday, November 20, 1987

BEFORE: HONORABLE CORNELIUS P. SULLIVAN, J.S.C.

TRANSCRIPT ORDERED BY: CHARLES H. NUGENT, JR., ESQUIRE

APPEARANCES:

STEPHEN G. RAYMOND, Burlington County Prosecutor
BY: LEWIS K. JACKSON, Assistant Prosecutor
On Behalf of the State of New Jersey

FRANCIS J. HARTMAN, ESQUIRE
By: CHARLES H. NUGENT, JR., ESQUIRE
On Behalf of Defendant Richard Bolte

FILED

APPELLATE DIVISION
FEB 18 1988
/s/ Jack G. Trubenbach
Clerk

Reported by:
GAIL B. MANKOWITZ, C.S.R. (XI01300)
Official Court Reporter
Burlington County Courts Facility
Mount Holly, New Jersey 08060

[2] (Friday, November 20, 1987, Mount Holly, New Jersey)

THE COURT: Gentlemen, on the Bolte case we might be able to handle the case as a matter of law, even though there are facts that are important, but the law is also important. If I could get an agreement from the lawyers, I don't think there's very much of a factual dispute. It's an interesting fact pattern and both briefs recite essentially the same facts but your interpretation of the facts are different legally. If that's the case I don't think we have to have testimony because the only issues are what we make of the facts.

And are you familiar with those ideas?

MR. NUGENT: I am, your Honor. Mr. Jackson and myself discussed those prior. I at least told Mr. Jackson I thought that there was good possibility I wouldn't put my client on the stand to refute anything the Officer said, not because I was stipulating to what they said but because I thought it was totally a legal issue.

THE COURT: I think it is too.

MR. NUGENT: And I agree with you, your Honor, because the facts aren't in issue, I think.

THE COURT: Let me recite what I think the [3] facts are and if the lawyers agree these are the facts then we'll go from there, but, as I understand, this gentleman was driving this automobile—it doesn't matter what the names

of the streets are—but in any event, he was driving basically on more or less a country road and then he came into contact with a police officer who began following him. The officer says he wanted to stop the man because he noted the vehicle weaving over the center lane and onto the shoulder. He followed him for a while and then he turned on his lights; maybe the siren too. I guess the siren too. And at that time the vehicle didn't stop like he expected it to but it drove into this housing development and then made a loop around the neighborhood, which kind of implies that maybe he was trying to lose the policeman. He pulled into a garage and as soon as he drove in the driveway the electric door—he went right into the garage and the policeman got in behind him and before the electric door closed. Now they are both standing in the garage and the man went into his home and the policeman followed the man into his home. It was like sort of a walk through the house where [4] the man kept absenting himself from the rooms the police would go to. Finally the man surrendered himself. The questions are—that's what I think the facts are. Is that right?

MR. JACKSON: The only thing we would have that are different from that is that the loop inside the development occurred four times, according to the officer.

THE COURT: Okay. To me that doesn't matter.

MR. NUGENT: I would agree substantially, your Honor, with what you said and with what Mr. Jackson just said.

THE COURT: The important crux is where did the arrest take place, because under the *Welsh* case if he saw this man commit a traffic violation he couldn't—let's say, you know, he was eating lunch at a fast food sandwich place somewhere along the road and he saw this man go by and commit a traffic violation. He couldn't finish his lunch, drive over the man's house and go in and arrest him.

MR. NUGENT: That's true.

THE COURT: That is whatever the—*Welsh*, the Federal, which is, I believe—

[5] MR. JACKSON: Right. United States Supreme Court, your Honor.

MR. NUGENT: Yes.

THE COURT: Right. So now the Prosecutor says we agree with that as a proposition of law. *Welsh* is good law. We don't contest it.

This case doesn't come under *Welsh*. This is more like another case.

MR. JACKSON: *Santana*.

THE COURT: Okay, *Santana*. And basically when I read this set of facts, what it reminded me of is the medieval concept of sanctuary, that the sheriff's men are on somebody's trail and he makes it into the cathedral where he can't be arrested. That's the kind of the sense I have of the situation, that if we view the arrest, or the attempt to stop, as having started before he got into his home, then if we said that the *Welsh* Doctrine applies then we would in effect be creating like a medieval doctrine or sanctuary. I don't mean medieval in a bad sense. That's just the way it would be.

If those facts are established I would like to ask you each to explain your positions about which way I should see it and then I will [6] rule.

MR. NUGENT: I have cited basically the *Welsh* case throughout my brief. There is other case law I want to bring to your attention.

THE COURT: Sure.

MR. NUGENT: Some of it is contained in the *Welsh* case itself in the substance of the case.

Firstly, in the *Santana* case, your Honor, there's the issue of hot pursuit. I think your Honor needs to distinguish between hot pursuit of a felon, a violent felon, a felon who was distributing heroin and who had marked money and who the police had an interest in at least arresting because of the possible disappearance of dissipation of the marked money. Also, it is here within itself. I think we have to distinguish between hot pursuit of a felon, hot pursuit of a traffic violator—I think the State's interest, the United States' interest in *Santana* were compelling enough that the warrant was essentially justified.

I think this case is more similar, your Honor, to the *Welsh* case. Though in *Welsh* I'm sure your Honor is aware of it but—and I hope [7] your Honor doesn't mind, I am going to read from the text of the Opinion from *Welsh* and it's going to take me a few minutes to finish.

THE COURT: That's all right.

I was just looking at the file and I see I had put papers from a completely unrelated case. I have your brief in front of me. Let me just find the Prosecutor's brief so that it will be easier for me to pick up the names.

Go ahead.

MR. NUGENT: Okay.

It was held in *Welsh*, your Honor, first of all, that the warrantless nighttime entry of petitioner's home to arrest him for a civil non-jailable traffic offense was prohibited by the special protections of the Fourth Amendment. Before government agents may invade the sanctity of the home the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attacnes to all warrantless home entries. An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense. That's clearly held in *Welsh*. The gravity, this was an erratic driving offense. [8] Possibly it might

have arisen to the level of an eluding, which is a disorderly persons offense, clearly though not a criminal offense under the Code of Criminal Justice. Application in the exigent circumstances exception in the context of a home entry should really be sanctioned when there is probable cause to believe that only a minor cause has been committed. This is *Welsh*.

First it's a warrantless arrest in the privacy of his own bedroom, nor a noncriminal traffic offense cannot be justified on the basis of hot pursuit because there was no immediate or continuous pursuit of the petitioner from the scene. Now, I think the State wishes to distinguish that aspect of it, your Honor.

The Court also rejected the other exigent circumstances of safety, public concern for the public safety and dissipation of evidence; the possible dissipation of blood alcohol content. The Court clearly rejected those. I think the same standard should be applied, is that the level of intrusion was not justified based on the Hot Pursuit Doctrine, your Honor.

[9] In *Payton vs. New York*, your Honor, I'd like to bring that to your attention, citing in my brief the Supreme Court disallowed the warrantless entry into the defendant's home on the occasion of a routine felony arrest. Now, this hasn't arisen to that, your Honor. As I said, possibly a disorderly persons.

THE COURT: Right. Well—it is a disorderly. You would like to be able to argue that it's only motor vehicle but once the person can be argued to disregard the officer's signal to stop it can get into the disorderly theory, and, I think we have to assume the officer would have charged him with a disorderly persons offense and was trying to effect the kind of thing.

MR. NUGENT: I probably agree, your Honor, but if he were to be convicted of an offense it would not be looked at in the eyes of the Court as a criminal conviction.

THE COURT: Right. It's not criminal.

MR. NUGENT: Okay. And I consider it to be a minor offense and that's my argument.

Now, I'd like to continue citing *Welsh*, 104 Supreme Court at Page 297. *Johnson vs. United* [10] *States*, Justice Jackson said the right of officers to thrust themselves into a home is a grave concern, not only to the individual but to society, which chooses to throw on reasonable security and freedom from civilians. I also quote from *Payton vs. New York*, your Honor, where it was also held, our decision in *Payton* allowing warrantless home arrests would be a showing of probable cause and exigent circumstances, was expressly limited to felony arrests.

Now, your Honor, clearly I have made my point clear. This in no way rose to the level of a felony. Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are issued, is particularly appropriate when the underlying offense for which there is probable cause is relatively minor. Before agents of the government may invade the sanctity of the home the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness. When the government's interest is only to arrest for a minor offense, citing *Payton*, that presumption of unreasonableness is difficult to rebut, your Honor, and I submit they [11] won't be able to rebut that presumption, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral detached magistrate.

Now, it was held even the dissentors in *Payton*, although believing that warrantless arrests are not prohibited by the Fourth Amendment, recognize the importance of the felony limitation on such arrests, your Honor, and that's the dissentor in *Payton*. Justice Jackson in *MacDonald vs. United States*, this method of law enforcement displays a shocking lack of all sense of proportion, whether there is

reasonable necessity for a search warrant without waiting to obtain a warrant certainly depends somewhat on the gravity of the offense thought to be in progress as well as the hazards of the methods of attempting to reach it. It is, to me, a shocking proposition that private homes, even quarters in a tenement may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.

I will continue with Justice Jackson's words. When an officer undertakes to act as his own [12] magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

Also, your Honor, *Wisconsin vs. Welsh*, in the text United States Supreme Court and Appellate Division, where warrantless entries into a home for minor violations were not allowed.

THE COURT: Okay. I happen to be very familiar with this particular area of law.

MR. NUGENT: Okay. Do you want me to express the State Supreme Court cases?

THE COURT: No. I know the *Welsh* decision. I know *Payton vs. New York.*

MR. NUGENT: I just wanted to bring your Honor's attention to *State vs. Guertin*, 90 Connecticut, 440 which is the Connecticut Supreme Court. Exigent circumstances exceptions narrowly drawn to cover cases of real and contrived emergencies, the exception is limited to the investigation of serious crimes; misdemeanors are excluded. *People vs. Strelow*, *People vs. Sanders*, *State vs. Bennett*; your Honor, those Courts, State Supreme Courts and Appellate Division Courts have rejected warrantless entries into homes based on [13] felonies. *Payton* rejects it. Surely

this doesn't rise to this level. It's a disorderly at most. It's a traffic offense at least.

The State, I think, is going to make three arguments. I believe they are going to say, okay, it's closer to *Santana*, number one, because it's hot pursuit. I don't agree. I do agree there was probably hot pursuit but I think the distinction has to be made between hot pursuit of a felon, a known violent felon and hot pursuit of a traffic violator.

I think, secondly, the Court clearly rejected in *Welsh*, and all other cases, the dissipation of evidence by the lowering of the blood alcohol content. I think they also reject the public safety concern because the petitioner in *Welsh* had already gotten out of his car, as had Mr. Bolte, your Honor.

As your Honor is aware, New Jersey routinely affords greater protections than that allowed by the United States. There's at least the minimal protection; *Welsh vs. Wisconsin*. New Jersey affords greater protections and I cite *People vs. Strelow* as an example.

I think that everything I've mentioned to [14] your Honor points to only one conclusion, that it was an unjustifiable warrantless entry. I think the officer could have probably, after being trained with his great experience, could have obtained a warrant. Telephonic oral applications for search warrants are not unheard of.

THE COURT: At least five judges that live within two minutes of that, right?

MR. NUGENT: I agree with you, your Honor. I think there is probably an internal procedure somewhere in the Moorestown Police Department that allows for telephonic oral applications for search warrants. Even if it wasn't telephonic they—there are judges all over the place. What I am trying to argue in the interest of the officer, his interest might be the dissipation of evidence. Arguing he was concerned about the dissipation of evidence, a tele-

phonic application for a search warrant could have been received by a local judge probably within 15 to 20 minutes if it needed to be.

The officer saw the garage door closing; jumped in the garage door. He followed the man into his house. He followed the man upstairs to [15] his bedroom and stuck his foot in the door when the man tried to close the bedroom door. It sounds like he had experiences as a vacuum salesman, but, your Honor, it's totally unreasonable. There is just no justification for it. The Hot Pursuit Doctrine and the other doctrines just don't allow it, and the man, the officer very easily could have got the search warrant and that's my argument.

THE COURT: Thank you very much.

Mr. Jackson.

MR. JACKSON: Judge, it wasn't vacuums. I believe it was life insurance.

Our position, essentially, your Honor, we have a few things that can distinguish this case from the *Welsh* situation. Firstly, your Honor, *Welsh*—and the Supreme Court spent a great deal of time—well, not a great deal of time but did spend time in their written Opinion that it was constantly dealt with drunken driving or DWI as a noncriminal civil type of a procedure where the maximum penalty was a $200 fine and no jail time.

THE COURT: Well, it's clear we view drunken driving so seriously nowadays but apparently in Wisconsin drunk driving wasn't that big a deal.

MR. JACKSON: At least not at the time.

[16] I believe in one of the concurrences they spent a great deal of time concurring with that Opinion and that it was just that Opinion that they felt one of the justices who concurred, they felt it was a noncriminal offense. They felt that was the reason for not doing it in the circum-

stances. Here we have a different situation. We have a disorderly persons offense; eluding plus the motor vehicle, which turned into a drunk driving, but it was at least careless at that time.

THE COURT: Wait a minute. Well, okay. You are talking in the majority drunk driving was at least the offense of careless driving; right?

MR. JACKSON: Well, it turned into a drunk driving after the other observations, your Honor. At that time the officer had no objective reason to believe other than the fact it was 2:00 a.m. I was just raising the point.

THE COURT: The way you used that term you were designating a disorderly persons or motor vehicle violation; careless driving. You didn't mean a person wasn't cautious? That's okay.

MR. JACKSON: Okay, your Honor. But in any event we have a definite disorderly persons offense which can be established clearly by the fact of the [17] way the driving occurred with the defendant doing the four loops; not stopping.

THE COURT: And what is that disorderly persons offense?

MR. JACKSON: What is it?

THE COURT: Yes.

MR. JACKSON: It's eluding. He was charged with it, your Honor.

THE COURT: I guess what you are doing is you are being a little too colloquial the way you are describing these crimes, so that if there was an appeal argument it would be unnecessarily obtuse.

MR. JACKSON: Then for the record, your Honor, eluding under 2C:29-2(b) which he was charged with. He also could have been charged under the Motor Vehicle Statute

with failure to yield or failure to obey a signal from the police officer. But it was the opinion of the officer involved that the Statute would merge into the eluding situation which was the disorderly persons offense.

And specifically, your Honor, he was also charged with reckless driving under 39:4-96 which would have been the actual operation. I believe that was observed, and then which led to the drunken driving or the DWI, which is 39:4-5.

[18] Now, specifically with the eluding charge, your Honor, that carries with it up to a six-month jail penalty. The drunk driving charge, even on a first offense, which isn't the case here, but, again, there's no knowledge at that point of the person being a second or subsequent offender. But, even a first offense carries a possible 30-day jail sentence which differentiates this case from *Wisconsin vs. Welsh* or *Welsh vs. Wisconsin.*

Before you there's a $1,000 fine on the disorderly. I don't know what the maximum fine is on driving while intoxicated but there is certainly driving license suspension involved, of at least six months, plus a minimum mandatory $250 fine. And, there are several other surcharges which of course that's going to entail on top of it.

THE COURT: The other charges are going to at least cost $1,000.

MR. JACKSON: I would assume that would be the case, Judge.

Your Honor, these are jailable offenses. That differentiates the situation versus *Welsh.*

Your Honor, we have here a definite hot pursuit. In Welsh we had a situation where the police came to the scene in response to a person [19] who was there and called them, and just happened upon the empty car, found some indicia of the registration of where this individual

was which was told by a witness who said he either appeared drunk or ill. They went to the house. A child admitted them. There wasn't any questioning concerning consent. That issue wasn't dealt with and they went to the bedroom. He was found and they arrested him. This case is different also from the fact that in the very beginning of the first encounter to the time he was arrested the patrolman never lost sight of the individual in the car. It is a continuous pursuit. And the State's, of course, position here is that the intent to arrest was formed, or at least stopped as soon as the lights and sirens were activated.

THE COURT: How about the point Mr. Nugent makes, really the bottom line, on this is not a hot pursuit case? Is there a distinction between hot pursuit for a motor vehicle and disorderly persons offenses as contrasted in a felony in hot pursuit?

MR. JACKSON: Your Honor, we don't believe that. In fact—there may be some motor vehicle cases where hot pursuit doesn't apply. [20] Specifically where safety may come into effect. I would assume there are policies specifically regarding high speed chases where police officers are instructed. You are not going to follow a car in that situation, which creates too great a risk to others around. The traffic, specifically if a car travels in excess of 100 miles an hour while fleeing a police car, that State Police car is not going to pursue in excess of that speed through heavy traffic. That's just not going to happen because of the safety considerations. I think it's somewhat analogous for a Fourth Amendment situation where you are not going to go busting down somebody's door when you believe they violated a parking situation.

THE COURT: Let me ask you this: The truth of the matter is I know these cases and it's a very interesting fact pattern in this. Would there be anything wrong from

a public policy point of view if I adopt Mr. Nugent's position?

MR. JACKSON: Yes, your Honor.

THE COURT: That's really the heart of the case, isn't it?

MR. JACKSON: There's one factual thing I should mention that wasn't brought out in [21] Mr. Nugent's and the Court's recitation of the facts. That is that the car which was the subject of the stop, the continental Pennsylvania license plate, and the reason that becomes important, your Honor, that although it came in through an automatic garage opener we are dealing with a New Jersey resident. It may come into effect that whether or not this person has any—may be entering the residence illegally.

THE COURT: If you drive around our town you see lots of company cars with Pennsylvania plates. I don't see any weight on that.

MR. NUGENT: I don't think potential burglars, your Honor, have automatic garage door openers to expensive homes in Moorestown.

THE COURT: Maybe. I don't know. But that doesn't get you anywhere in my book.

MR. JACKSON: Your Honor, I just wanted the facts to be clear on that.

Your Honor, I would point out a couple of things with regard to that. First off, out of the State Opinion in *Connecticut*, the Michigan, et cetera, that was cited by Mr. Nugent is not persuasive in this case. The way other States handle the situation may have been of interest but [22] it's not precedent as far as New Jersey is concerned. We only deal with New Jersey Opinions and the Supreme Court and Appellate Courts in the federal system which applies to New Jersey.

THE COURT: But remember, when a judge asks you to address an argument you really ought to come back to an argument. You are really wasting your time I am saying to you. You are talking about all kinds of things I don't disagree with you on.

The main issue is what's the problem if I adopt Mr. Nugent's Opinion? There are public policy problems, it seems to me. Go ahead.

MR. JACKSON: Two things, Judge.

From a public safety standpoint we have an individual who can go back into his residence. He's there. The police are going to lose sight of that individual. He is going to have an opportunity to either consume more alcohol or be able to say he consumed more alcohol—but he loses because of *Welsh*. They said forget it. Dissipation of evidence is not adequate grounds. So even the second part of that particular point, your Honor, it's going to take them at least a half an hour to get a search warrant.

[23] THE COURT: No problem. That is not going to win because of *Welsh*.

MR. JACKSON: Finally, your Honor, the second public safety argument alone, that being *State vs. Tischio*. In *Tischio* they talked about the race to the next bar and in fact that .10 is the legal standard at that point, .10 equals driving while intoxicated. In this case, your Honor, what we have here instead is a person who instead of racing to the next bar is going to race to his home to make sure that he can evade the police.

THE COURT: I understand your position. Thanks, Mr. Jackson. I don't mean to cut you off but I don't want to waste time either.

MR. JACKSON: I understand.

THE COURT: It seems to me the practical problem with this is an operation that encourages people to disobey a

police officer when they tell them to stop, that's what's wrong with the provision that Mr. Nugent supports. I mean there is a comical aspect to this although the defendant is not very funny because he knew if he got caught drunk driving he knows that he would be in a lot of trouble and it was probably a bad experience for his wife and there may be kids at home. And, it's [24] not funny from the officer's point of view because when he is following somebody he has to watch his step to make sure he doesn't hurt anybody, have traffic accidents and all that. But to me the other leaning thing is we would be creating a sanctuary doctrine. We would say when a policeman stops you for a traffic violation, or tries to stop you, if you can make it to your home then you effectively can't be prosecuted. I mean for one thing, you know, drunk driving, you have no practical problems. What you mentioned, a perfectly sensible and good thought, you know, swallow down a lot of alcohol and drive their blood alcohol out so the subsequent blood alcohol would not be probative.

But even on things like speeding, very often the officers don't have proof beyond a reasonable doubt while operating a motor vehicle until after its stopped. And they may not have been able to say, you know, in this case, both the husband and wife were in the house when the police officer was present. It's possible the officer might not have seen that the driver was a male and perhaps he could have generated a defense that way. So, if we allow people to go to their homes, where we are [25] warning people for disobeying the requirements, that people stop when they are signaled to stop by police officers and we are creating an extraordinary large impediment to simple enforcement of criminal laws and motor vehicle laws. But more important than that, we are creating a terribly dangerous situation where people are upset and fearful, would be trying to flee from the police. They would be jeopardizing the policeman, the person who is running and anybody who might get in their way in between times. So I

think the practical problem is that *Payton vs. New York*, *Wisconsin vs. Welsh* doctrines simply can't apply in a hot pursuit situation and that the concept of hot pursuit seems perfectly appropriate in this kind of case. That there are times when a distinction should be made between whether arrests are a felony or serious crime or minor traffic violation. There are times when that's very significant but I don't think in the context of this case.

I think the gentleman who is driving the car had a duty to stop and if we award him by allowing him to evade the police by what he attempted to do we would be encouraging other people to do the same thing, which would be very, very much contrary to [26] public policy. There's no legal doctrine that prohibits the officer from doing what he did. I'm sure the officer wasn't happy about the situation but if he capitulated to that situation then he would have in effect inviting other people to do the same thing and that would be highly undesirable.

I think in this case very thoughtful recitation was made but the Motion to Suppress must be denied and I will sign an Order to that effect. I will ask the State to submit it.

MR. JACKSON: Thank you, your Honor.

MR. NUGENT: Thank you, your Honor.

THE COURT: Thank you very much, Gentlemen.

(Whereupon the hearing was concluded.)

**CERTIFICATE**

I, GAIL B. MANKOWITZ, Official Court Reporter of the State of New Je-sey, certify the foregoing to be a true and accurate transcript of my stenographic notes taken in the hereinabove matter.

/s/ Gail B. Mankowitz
GAIL B. MANKOWITZ, CSR
(XI01300)

Dated: 12/8/87

## APPENDIX B

**SUPERIOR COURT OF NEW JERSEY**
**BURLINGTON COUNTY**
**LAW DIVSION**

**CRIMINAL ACTION**

STATE OF NEW JERSEY

*Plaintiff,*

vs.

RICHARD BOLTE

*Defendant.*

**ORDER**

This matter having been opened to the Court by Charles H. Nugent, Jr., Esquire, Attorney for defendant, with Lewis K. Jackson, Assistant Burlington County Prosecutor, appearing on behalf of the State in opposition thereto;

And the Court having considered the briefs, oral arguments, and testimony submitted by counsel;

IT IS on this 8th day of December, 1987 ORDERED that defendant's motion to suppress evidence seized in this matter be and the same is hereby denied.

/s/ C. P. Sullivan
CORNELIUS P. SULLIVAN, J.S.C.

**APPENDIX C**

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

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**DOCKET NO. AM-488-87T5**
**MOTION NO. M-2068-87**

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STATE OF NEW JERSEY

VS

RICHARD BOLTE

**ORDER ON MOTION**

BEFORE PART: G
JUDGE(S): FURMAN
LONG
SCALERA

FILED
APPELLATE DIVISION
JAN 22 1988

/s/ Jack G. Trubenbach
Clerk

MOTION FILED: DECEMBER 18, 1987
SUBMITTED TO COURT: JANUARY 6, 1988

**ORDER**

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 19 DAY OF January, 1988, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT RICHARD BOLTE
FOR LEAVE TO APPEAL
GRANTED

FOR THE COURT:

/s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN P.J.A.D.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Jack G. Trubenbach
Clerk of the Appellate Division

## APPENDIX D

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

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**A-2276-87T5**

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STATE OF NEW JERSEY,
*Plaintiff-Respondent,*

v.

RICHARD BOLTE,
*Defendant-Appellant.*

Argued April 20, 1988 - Decided MAY 31 1988

Before Judges Furman and Long.

On appeal from the Superior Court, Law Division, Burlington County.

Stephen W. Kirsch argued the cause for appellant (Francis J. Hartman, attorney).

Jeanne Covert, Assistant Burlington County Prosecutor, argued the cause for respondent (Stephen G. Raymond, Burlington County Prosecutor, attorney; Kathy Morrissey, Assistant Prosecutor, of counsel and on the letter brief).

The opinion of the court was delivered by LONG, J.A.D.

On April 6, 1987, defendant Richard Bolte was arrested and charged by complaint with reckless driving, contrary to *N.J.S.A.* 39:4-96; driving while intoxicated (d.w.i.), contrary to *N.J.S.A.* 39:4-50; refusal to submit to a breathalyzer test, contrary to *N.J.S.A.* 39:4-50.2; speeding,

contrary to *N.J.S.A.* 39:4-99; driving on an expired license, contrary to *N.J.S.A.* 39:3-10; failure to maintain a single lane, contrary to *N.J.S.A.* 39:4-88b; disorderly conduct, contrary to *N.J.S.A.* 2C:33-2a; eluding, contrary to *N.J.S.A.* 2C:29-2b; and resisting arrest, contrary to *N.J.S.A.* 2C:29-2a. He filed a motion to suppress the evidence against him. The trial judge denied the motion, and we granted defendant leave to appeal from that denial.

The facts in the case are essentially undisputed. At approximately 1:40 a.m. on April 6, 1987, Patrolman William E. Liss, Jr. of the Moorestown Police Department was on routine patrol when he observed a 1986 four-door Lincoln Continental. The driver and sole occupant of the Lincoln was later identified as the defendant, Richard J. Bolte. Liss followed the Lincoln for approximately one mile on Tom Brown Road and observed the Lincoln weaving and moving off the pavement over the shoulder of the road onto the grass. The Lincoln turned at the intersection of Westfield Road and headed south. At this point, Liss activated his emergency lights and siren to alert the driver to stop the Lincoln. The Lincoln did not stop. Liss followed the Lincoln on Westfield Road for approximately six-tenths of a mile with the emergency lights and siren on. During this time, he observed the driver look into his rear view mirror and ignore the presence of the patrol vehicle. The Lincoln turned right onto Stanwick Glen Road, travelled approximate 200 feet and made lefts onto Sentinel Road, Deerfield Terrace, Eagle Brook Drive, and back onto Stanwick Glen Road to complete a circle of the neighborhood. After completing this route, the Lincoln repeated it, increasing its speed each time, for a total of four tours of the neighborhood. The speed ranged from 20 miles per hour to approximately 48 miles per hour, and according to Liss, as the speed increased, the operation of the vehicle became more erratic. On the fourth lap around the neighborhood, the Lincoln entered the driveway of 511 Eaglebrook Drive. The garage door was opened, apparently

automatically. Liss followed the car, and exited his patrol car in the driveway. He entered the garage just as the automatic garage door started to close, and the defendant got out of the Lincoln. Defendant entered the house. Liss asked the defendant to open the door, but defendant continued on his way. Liss followed the defendant into the house and advised him that he was under arrest. Defendant continued to ignore the officer's request and continued to walk through the house. He then ran up the stairs and entered what appeared to be a bedroom and attempted to close the door. Patrolman Liss followed, was able to keep the door from closing and continued to advise the defendant that he was under arrest. Defendant began to talk to someone in the bedroom. At this point, Liss left the bedroom door which was then closed and locked. He then let Patrolman Fullerton and Sergeant Pugh of the Moorestown Police Department, to whom he had radioed for backup, into the residence. When Liss returned to the bedroom, the door had been unlocked, and he was greeted by a woman, later identified as Mrs. Bolte, the wife of the defendant. The defendant then came out of the bathroom, which was located in the bedroom, and was again advised that he was under arrest. After a minor struggle, the defendant was handcuffed and taken to the station for processing. He was subsequently charged with numerous motor vehicle and disorderly persons violations. On this appeal defendant claims that:

> JUDGE SULLIVAN'S DECISION TO DENY DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SHOULD BE REVERSED SINCE NO EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE WARRANTLESS ENTRY INTO DEFENDANT'S HOME AND, THUS, THE SUBSEQUENT ARREST OF DEFENDANT WAS UNCONSTITUTIONAL.

We have carefully reviewed this record and have concluded that the motion to suppress should have been granted. Thus, we reverse.

It is well-established that under ordinary circumstances, a warrant is required in order to justify the search of a person or property. *Katz v. United States*, 389 *U.S.* 347, 88 *S.Ct.* 507, 19 *L.Ed.*2d 576 (1967). The procedure of obtaining a warrant is a caution to insure that there is a reasonable basis for the search and that the intrusion will be confined in scope. *State v. Bruzzese*, 94 *N.J.* 210, 218 (1983), *cert.* den. 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984) citing *Katz, supra*, 389 *U.S.* at 358-59, 88 *S.Ct.* at 515, 19 *L.Ed.*2d at 585-86. Lacking the procedural safeguards of a warrant, a warrantless search is presumed to be invalid. *State v. Valencia*, 93 *N.J.* 126, 133 (1983). Certain exceptions to the warrant requirement have developed over the years, two of which were invoked by the State in this case: the "hot pursuit" exception of *Carroll v. United States*, 267 *U.S.* 132, 45 *S.Ct.* 280, 69 *L.Ed.* 543 (1925), and the exigent circumstances exception addressed in *Payton v. New York*, 445 *U.S.* 573, 100 *S.Ct.* 1371, 63 *L.Ed.*2d 639 (1980). The State argues (and the trial judge agreed) that these exceptions justified the officer's warrantless intrusion because he was in the process of pursuing a miscreant who was trying to elude him and because the possible dissipation of blood alcohol presented exigent circumstances. We disagree.

The two Supreme Court cases which established "hot pursuit" as a limited exception to the warrant requirement are *Warden v. Hayden*, 387 *U.S.* 294, 87 *S.Ct.* 1642, 18 *L.Ed.*2d 782 (1967) and *United States v. Santana*, 427 *U.S.* 38, 96 *S.Ct.* 2406, 49 *L.Ed.*2d 300 (1976). These decisions both involved fleeing felons and were based not only on the concept of hot pursuit but also on separate emergent considerations which, when coupled with the pursuit, justified the warrantless intrusion. In *Warden*, both flight and injury to innocent members of the public were strong pos-

sibilities even after the armed robber had entered his home. In *Santana*, destruction of valuable evidence (heroin and marked bills) was likely to occur if the police waited for a warrant to arrive before entering the defendant's home. These cases are totally distinguishable from this one. As the State conceded in its brief and again at oral argument, here the officer had probable cause only as to certain motor vehicle offenses (not d.w.i.) and eluding. These relatively minor offenses do not justify the kind of warrantless intrusion which occurred here. *Payton v. New York, supra; see also Welsh v. Wisconsin*, 466 *U.S.* 740, 104 *S.Ct.* 2091, 80 *L.Ed.*2d 732 (1984); *People v. Strelow*, 96 *Mich.App.* 182, 292 *N.W.*2d 517 (Mich.Ct. 1980). As the court in *Strelow* observed:

> The hot pursuit doctrine excuses strict adherence to statutory notice and demand mandates in order to prevent police from being unduly burdened in their efforts to arrest criminals *guilty of serious offenses*. Preventing the escape of a *fleeing felon* may necessarily prevail over the interests the statute was designed to protect. Employing the same balancing test, *the less serious nature of a misdemeanor offense militates against extending the hot pursuit exception to justify unannounced entry into a private residence to make such an arrest*. Important interests such as privacy expectations and prevention of unnecessary violence must, in this instance, prevail (emphasis added). [292 *N.W.*2d at 521.]

Moreover, even if we did not view the hot pursuit exception to be limited to serious offenses, we think that additional emergent factors such as those considered in *Warden* and *Santana*, would have to be present to justify a warrantless entry. The State claims that the dissipation of blood alcohol is the additional factor present in this case. This argument must fail. As the State has properly conceded, Liss did not have probable cause to believe that

defendant was guilty of d.w.i. Erratic driving alone is an insufficient basis for the necessary probable cause finding. Under the circumstances, he could not justify his warrantless intrusion on the need to avoid the dissipation blood alcohol because blood alcohol was not evidential as to any offense with respect to which he had probable cause.

Moreover, even if he had had probable cause to believe that defendant had committed a d.w.i. offense, the result would be the same. In *Welsh v. Wisconsin, supra*, the police arrested a defendant in his home without a warrant after witnesses to a motor vehicle accident in which defendant was involved said that he appeared to be drunk or sick as he walked home from the scene. In invalidating defendant's conviction for refusal to undergo the breathalyzer test, the Supreme Court reaffirmed the principal that exceptions to the warrant requirement are extremely rare and "that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." It concluded that except in the case of a very serious crime,

> a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood - alcohol level might have dissipated while the police obtained a warrant (footnote omitted). [466 *U.S.* at 754, 104 *S.Ct.* at 2100, 80 *L.Ed.*2d at 746.]

In sum, the warrantless intrusion in this case failed to meet the Fourth Amendment standard of reasonableness. Liss saw defendant commit various minor traffic offenses. He followed defendant home. (It was obviously defendant's home because he activated the garage door automatically from his car). At this point, Liss erred. Instead of sneaking under the garage door, he should have gotten out of his car and rung the doorbell. Defendant might well have emerged. Even if he did not, the other officers were by then at or near the scene. The house could have been

secured and a warrant obtained, in person or telephonically if necessary. Instead, Liss undertook a perilous course of action which violated the sanctity of defendant's home for absolutely no good reason. There was simply no "substantial police need" for the action he took. *State v. Seiss*, 168 *N.J. Super.* 269 (App.Div. 1979).

We thus reverse and remand the matter for the entry of an order of suppression.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Jack M. Trubenbach
Clerk of the Appellate Division

## APPENDIX E

## SUPREME COURT OF NEW JERSEY
**M-14/15 September Term 1988**

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**29,026**

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STATE OF NEW JERSEY,
*Plaintiff-Movant,*

vs.

RICHARD BOLTE,
*Defendant-Respondent.*

FILED
SUPREME COURT
DEC 21 1988
/s/ Stephen W. Townsend
Clerk

**ORDER**

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file motion as within time (M-14) is granted; and it is further

ORDERED that the motion for leave to appeal (M-15) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 19th day of December, 1988.

/s/ Stephen W. Townsend
CLERK OF SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

## APPENDIX F

**SUPREME COURT OF NEW JERSEY**
**A-152 September Term 1988**

STATE OF NEW JERSEY,
*Plaintiff-Appellant,*

v.

RICHARD J. BOLTE,
*Defendant-Respondent.*

Argued April 25, 1989 — Decided July 12, 1989

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 225 *N.J. Super.* 335 (1988).

*Boris Moczula*, Deputy Attorney General, argued the cause for appellant (*Peter N. Perretti, Jr.*, Attorney General of New Jersey, attorney).

*Stephen W. Kirsch* argued the cause for respondent (*Francis J. Hartman*, attorney).

The opinion of the Court was delivered by STEIN, J.

In this case the Court is called on to determine whether a police officer, in "hot pursuit" of a person suspected of numerous motor vehicle and disorderly persons offenses, may make a warrantless entry into the suspect's home to effect an arrest.

In the early morning hours of April 6, 1987, a Moorestown police officer, after observing certain erratic driving behavior and trailing an automobile for approximately one mile, followed Richard Bolte, the driver, to his residence. Bolte exited his car and entered his home through a garage door. The officer followed him into the garage, then into the house and upstairs to the bedroom door where Bolte's wife was asleep. The officer informed Bolte that he was under arrest. Later, at the station house, Bolte refused to submit to a breathalyzer test.

Bolte was charged with a number of motor vehicle and disorderly persons offenses. Bolte moved to suppress the evidence of his refusal to submit to a breathalyzer test on the ground that it was the product of an unlawful arrest. The trial court denied Bolte's motion, holding that the "hot pursuit" and "exigent circumstances" exceptions to the fourth amendment warrant requirement justified the officer's intrusion into Bolte's home. The Appellate Division granted defendant's motion for leave to appeal, and reversed and remanded for entry of a suppression order. *State v. Bolte*, 225 *N.J. Super.* 335 (1988). The court held that the "hot pursuit" exception to the fourth amendment warrant requirement is limited to serious offenses, and concluded that even absent a "serious offense" limitation, "exigent circumstances" did not exist in this case. *Id.* at 339-40. The court concluded that there was "no 'substantial police need' " for the warrantless invasion of Bolte's home. *Id.* at 341. This Court granted the State's motion for leave to appeal. We affirm.

I.

On April 6, 1987, at 1:40 a.m., Moorestown Police Officer William Liss began to follow an automobile after he noticed the automobile swerving on and off the road. When the automobile signalled a turn, the officer activated his lights and siren. Officer Liss observed the driver look into his mirror, apparently ignore the presence of the patrol vehicle, and continue on. The automobile made four loops of the neighborhood, increasing its speed as it proceeded. The speed ranged from twenty miles per hour to approximately forty-eight miles per hour. According to Liss, as the speed increased, the operation of the vehicle became more erratic.

The automobile finally stopped in the driveway of a private residence. The driver, Richard Bolte, exited the car and entered his garage. Officer Liss followed Bolte to the garage, into the house and upstairs to the bedroom

door where Liss informed Bolte that he was under arrest. Later, at the station house, Bolte refused to take a breathalyzer test, the evidence that he subsequently moved to suppress.

Bolte was charged with reckless driving, *N.J.S.A.* 39:4-96; driving while intoxicated (DWI), *N.J.S.A.* 39:4-50; refusal to submit to a breathalyzer test, *N.J.S.A.* 39:4-50.2; speeding, *N.J.S.A.* 39:4-99; driving on an expired license, *N.J.S.A.* 39:3-10; failure to maintain a single lane, *N.J.S.A.* 39:4-88b; disorderly conduct, *N.J.S.A.* 2C:33-2a; eluding, *N.J.S.A.* 2C:29-2b; and resisting arrest, *N.J.S.A.* 2C:29-2a.

The parties submitted a stipulation to the facts of Bolte's arrest. In the trial court, defendant moved to suppress the evidence of his refusal to submit to a breathalyzer test on the basis that the arrest was unlawful.[1] The trial court denied the motion, agreeing with the State that the "hot pursuit" and "exigent circumstances" exceptions to the fourth amendment warrant requirement justified the officer's intrusion into Bolte's home because Bolte was eluding apprehension by Officer Liss and because of the possible dissipation of alcohol in his blood. The court maintained that "the practical problem" with defendant's argument is that it "encourages people to disobey a police officer when they tell them to stop."

In reversing and remanding for entry of a suppression order, the Appellate Division concluded that neither the "hot pursuit" nor "exigent circumstances" exception, jointly or separately, supported the denial of defendant's suppression motion. The court concluded that the United States Supreme Court opinions in *Warden v. Hayden*, 387

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[1] In that connection, we note that the statutory predicate for imposing penalties for refusal to submit to a breathalyzer test is that the defendant has been arrested for a violation of *N.J.S.A.* 39:4-50. See *N.J.S.A.* 39:4-50a. It is evident that the statute contemplates a *lawful* arrest.

U.S. 294, 87 *S.Ct.* 1642, 18 *L.Ed.*2d 782 (1967), and *United States v. Santana*, 427 *U.S.* 38, 96 *S.Ct.* 2406, 49 *L.Ed.*2d 300 (1976), cases that recognized "hot pursuit" as a limited exception to the fourth amendment warrant requirement, were distinguishable from *Bolte*. 225 *N.J. Super.* at 335. The court maintained that the "hot pursuit" exception is applicable only to serious offenses. *Ibid.* The court observed that *Hayden* and *Santana* "both involved fleeing felons and were based not only on the concept of hot pursuit but also on separate emergent considerations which, when coupled with the pursuit, justified the warrantless intrusion." *Ibid.* The court added:

> [E]ven if we did not view the hot pursuit exception to be limited to serious offenses, we think that additional emergent factors such as those considered in *Warden* and *Santana* would have to be present to justify a warrantless entry. The State claims that the dissipation of blood alcohol is the additional factor present in this case. This argument must fail. As the State has properly conceded, Liss did not have probable cause to believe that defendant was guilt of DWI. Erratic driving alone is an insufficient basis for the necessary probable cause. [*Id.* at 340.]

Thus, the court concluded that the State failed to justify the warrantless intrusion in this case. *Ibid.*

## II.

The United States Supreme Court and this Court continue to adhere to the notion that warrantless searches or arrests in the home must be subjected to particularly careful scrutiny. The Supreme Court has recently reaffirmed the principle that only in extraordinary circumstances may a warrantless home arrest or search be justified. *See Welsh v. Wisconsin*, 466 *U.S.* 740, 104 *S.Ct.* 2091, 80 *L.Ed.*2d 732 (1984).

In *Silverman v. United States*, 365 *U.S.* 505, 81 *S.Ct.* 679, 5 *L.Ed.*2d 734 (1961), Justice Stewart wrote:

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.
>
> This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard
> * * *
>
> What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." [*Id.* at 511-12, 81 *S.Ct.* at 683, 5 *L.Ed.*2d at 739 (citations omitted).]

In *Silverman*, the Court invalidated a warrantless search involving police interception by an electronic listening device of conversations in the home of suspected gamblers. *Id.* at 512, 81 *S.Ct.* at 683, 5 *L.Ed.*2d at 739.

The Court reiterated this protective approach in *Chimel v. California*, 395 *U.S.* 752, 89 *S.Ct.* 2034, 23 *L.Ed.*2d 685 (1969), where it stated:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that

> an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. [*Id.* at 761, 89 *S.Ct.* at 2039, 23 *L.Ed.*2d at 693.]

*Chimel* invalidated a search of defendant's home subsequent to a valid arrest as too broad in scope. *Id.* at 768, 89 *S.Ct.* at 2043, 23 *L.Ed.*2d at 697.

Justice Garibaldi expressed this basic principle in *State v. Bruzzese*, 94 *N.J.* 210 (1983), *cert.* denied, 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984):

> The [United States] Supreme Court has consistently asserted that "the rights of privacy and personal security protected by the Fourth Amendment . . . are to be regarded as of the very essence of constitutional liberty. . . ." Historically, the Court has applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling. Indeed, one of this country's most protected rights throughout history has been the sanctity and privacy of a person's home. [94 *N.J.* at 217.]

Warrantless searches, particularly in a home, are presumptively unreasonable and invalid unless justified by a recognized exception to the warrant requirement. *See Welsh v. Wisconsin*, *supra*, 466 *U.S.* at 749, 104 *S.Ct.* at 2097, 80 *L.Ed.*2d at 742; *State v. Bruzzese*, *supra*, 94 *N.J.*

at 218; *State v. Valencia*, 93 *N.J.* 126, 133 (1983); *State v. Young*, 87 *N.J.* 132, 141 (1981). This Court has expressed its willingness to adopt as its own law "the specific exceptions [to the warrant requirement] created by the United States Supreme Court." *State v. Patino*, 83 *N.J.* 1, 7 (1980)[2] ("The warrant requirement . . . may be dispensed with in only a few narrowly circumscribed exceptions. The *prima facie* invalidity of any warrantless search is overcome only if that search falls within one of the specific exceptions created by the United States Supreme Court."); *State v. Ercolano*, 79 *N.J.* 25, 41-42 (1979) ("[T]he basic precept of the Fourth Amendment [is] that any warrantless search is *prima facie* invalid and gains validity only if it comes within one of the specific exceptions created by the United States Supreme Court."). Moreover, "the State must prove the overall reasonableness and validity of [such] a search." *Bruzzese, supra*, 94 *N.J.* at 218.

This Court and the United States Supreme Court have adopted the principle that "exigent circumstances" in conjunction with probable cause may excuse police from compliance with the warrant requirement. *See State v. Bruzzese, supra*, 94 *N.J.* at 217-18; *State v. Valencia, supra*, 93 *N.J.* at 136 ("to sustain a warrantless search, the State must ordinarily demonstrate that exigent circumstances prevented obtaining a written warrant and that probable cause for the search existed."). Despite the widespread acceptance of the "exigent circumstances" exception in both federal and state courts,[3] this exception to

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[2] *But cf. State v. Novembrino*, 105 *N.J.* 95, 105 (1987) (rejecting application of United States Supreme Court's adoption of "good faith" exception to the exclusionary rule where warrants are issued on less than probable cause).

[3] *See, e.g., United States v. Socey*, 846 *F.*2d 1439 (D.C. Cir.), *cert.* denied, ___ *U.S.* ___, 109 *S.Ct.* 152, 102 *L.Ed.*2d 123 (1988); *United States v. Catthouse*, 846 *F.*2d 144 (2d Cir.), *cert.* denied, ___ *U.S.* ___, 109 *S.Ct.* 316, 102 *L.Ed.*2d 335 (1988); *United States v. Rubin*, 474 *F.*2d 262 (3d

the fourth amendment warrant requirement has not frequently been considered by either the United States Supreme Court or this Court.[4]

In *Payton v. New York*, 445 *U.S.* 573, 100 *S.Ct.* 1371, 63 *L.Ed.*2d 639 (1980), the Court invalidated state statutes that authorized police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In *Payton*, while the warrantless arrests at issue may have been justified by "exigent circumstances," the Court did not consider that question because "none of the New York courts relied on any such justification" and the state's highest court "treated both * * * cases [below] as involving routine arrests in which there was ample time to obtain a warrant." 445 *U.S.* at 582-83, 100 *S.Ct.* at 1378, 63 *L.Ed.*2d at 648. Therefore the Court in *Payton* did not consider what sort of exigent circumstances "would justify a warrantless entry into a home for the purpose of either arrest or search." *Id.* at 583, 100 *S.Ct.* at 1378, 63 *L.Ed.*2d at 649.

In *Warden v. Hayden*, *supra*, 387 *U.S.* 294, 87 *S.Ct.* 1642, 18 *L.Ed.*2d 782, the Court upheld a warrantless search of a private residence. Two cab drivers in the vi-

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Cir.), *cert.* denied *sub nom. Agran v. United States*, 414 *U.S.* 833, 94 *S.Ct.* 173, 38 *L.Ed.*2d 68 (1973); *Dorman v. United States*, 435 *F.*2d 385 (D.C. Cir. 1970) (*en banc*); *People v. Eichelberger*, 438 *N.E.*2d 140 (Ill.), *cert.* denied, 459 *U.S.* 1019, 103 *S.Ct.* 383, 74 *L.Ed.*2d 514 (1982); *State v. Hatcher*, 322 *N.W.*2d 210 (Minn. 1982).

[4]*Cf. Salken, Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for A Rule*, 39 Hastings L.J. 283, 283 (1988) ("The Supreme Court has infrequently considered the question and has never provided a clear standard for determining when warrantless action is justified.").

The Court itself has acknowledged that it has "[left] to the lower courts the initial application of the exigent circumstances exception." *Welsh v. Wisconsin*, *supra*, 466 *U.S.* at 749, 104 *S.Ct.* 2097, 80 *L.Ed.2d* at 743.

cinity of an armed robbery, attracted by shouts of "Holdup," followed a man fleeing the robbed premises to a certain address. One driver described the man to his dispatcher while the latter, by company radio dispatch, relayed the information to the police who were then proceeding to the scene of the robbery. 387 *U.S.* at 297, 87 *S.Ct.* at 1645, 18 *L.Ed.*2d at 786. The following ensued:

> Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection. The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent in his trial. [*Id.* at 297-98, 87 *S.Ct.* at 1645, 18 *L.Ed.*2d at 786-87.]

Under the circumstances, the Court held that "the exigencies of the situation made that course imperative," *id.* at 298, 87 *S.Ct.* at ___, 18 *L.Ed.* at 787 (quoting *McDonald v. United States*, 335 *U.S.* 451, 456, 69 *S.Ct.* 191,

193, 93 *L.Ed.* 153, 158 (1948)). The Court found significant that "[t]he police were informed that an armed robbery had taken place, and that the suspect had entered [the residence] less than five minutes before they reached it." 387 *U.S.* at 298, 87 *S.Ct.* at 1646, 18 *L.Ed.*2d at 787. The Court maintained that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298-99, 87 *S.Ct.* at 1646, 18 *L.Ed.*2d at 787.[0001]

*Santana* involved the warrantless search of a private dwelling pursuant to an undercover police officer's arrangement of a drug purchase from a third party. 427 *U.S.* 38, 49 *L.Ed.*2d 300, 96 *S.Ct.* 2406. The officer, Michael Gilletti, arranged a heroin "buy" with Patricia McCafferty, from whom he had previously purchased narcotics. After McCafferty told Gilletti that they would "go down to Mom Santana's for the dope," Gilletti met McCafferty at a prearranged location. Gilletti and McCafferty drove to what she informed him was Santana's residence. McCafferty made the planned drug purchase with marked money. She then turned over to Gilletti several glassine envelopes containing a brownish-white powder believed to be heroin. Gilletti told her that the police were going back to the location of the drug purchase and asked where the money was. It is helpful to provide the Court's recital of what ensued:

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[0001] Although the court in *Warden* did not then refer to it as such, the Supreme Court subsequently in *Santana* considered *Warden* a "hot pursuit" case. *United States v. Santana*, *supra*, 427 *U.S.* at 42-43, 96 *S.Ct.* at 2410, 49 *L.Ed.*2d at 305. It seems that the phrase "hot pursuit" first appears in *Johnson v. United States*, 333 *U.S.* 10 n.7, 68 *S.Ct.* 367 n.7, 92 *L.Ed.* 436 n.7 (1968), where the Court recognized that "some element of a chase will usually be involved in a 'hot pursuit.'" *United States v. Santana*, *supra*, 427 *U.S.* at 43 n.3, 96 *S.Ct.* at 2410 n.3, 49 *L.Ed.* at 305 n.3.

> She said, "Mom has the money." At this point Sergeant Pruitt and other officers came up to the car. Gilletti showed them the envelope and said "Mom Santana has the money." Gilletti then took McCafferty to the police station.
>
> Pruitt and the others then drove approximately two blocks back to [Santana's residence]. They saw Santana standing in the doorway of the house with a brown paper bag in her hand. They pulled up to within 15 feet of Santana and got out of their van, shouting "police," and displaying their identification. As the officers approached, Santana retreated into the vestibule of her house.
>
> The officers followed through the open door catching her in the vestibule. As she tried to pull away, the bag tilted and "two bundles of glazed paper packets with a white powder" fell to the floor. Respondent Alejandro tried to make off with the dropped envelopes but was forcibly restrained. When Santana was told to empty her pockets she produced $135, $70 of which could be identified as Gilletti's marked money. The white powder in the bag was later determined to be heroin. [*Id.* at 39-41, 96 *S.Ct.* at 2407-09, 49 *L.Ed.*2d at 303-04.]

The issue in *Santana* was "whether [Santana's] act of retreating into her house could thwart an otherwise proper arrest." *Id.* at 42, 96 *S.Ct.* at 2409, 49 *L.Ed.*2d at 305. The Court first observed that if Santana were in a public place, she could have been arrested without a warrant. *Ibid.*, 49 *L.Ed.*2d at ___ (citing *United States v. Watson*, 423 *U.S.* 411, 96 *S.Ct.* 820, 46 *L.Ed.*2d 598 (1976)). However, as the facts indicate, Santana retreated into the vestibule of her house prior to the officers' entry through the open door. *Id.* at 40, 96 *S.Ct.* at 2408, 49 *L.Ed.*2d at 304. The court analyzed these events as follows:

> This case, involving a true pursuit, is clearly governed by *Warden*; the need to act quickly here is even greater than in that case while the intrusion is much less. The District Court was correct in concluding that "hot pursuit" means some sort of a chase, but it need not be an extended hue and cry "in and about [the] public streets." The fact that the pursuit here ended almost as soon as it began did not render it any less a "hot pursuit" sufficient to justify the warrantless entry into Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified.
>
> We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place. [*Id.* at 42-43, 96 *S.Ct.* at 2409-10, 49 *L.Ed.*2d at 305-06 (citations omitted).]

While Santana was the first Supreme Court case to articulate the "hot pursuit" exception, it has since been interpreted to apply only to the pursuit of fleeing felons.[6]

The Court's most recent pronouncement on the "exigent circumstances" exception to the warrant requirement is *Welsh v. Wisconsin, supra*, 466 *U.S.* 740, 104 *S.Ct.* 2091,

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[6] *See, e.g., Welsh v. Wisconsin, supra*, 466 *U.S.* 940, 104 *S.Ct.* 2091, 80 *L.Ed.*2d 732; *United States v. Aquino*, 836 *F.*2d 1268 (10th Cir. 1988) ("The only case in which the Supreme Court has held the exigent circumstance exception sufficient to justify warrantless entry into a suspect's home involved the hot pursuit of a fleeing felon whom the police could have lawfully arrested without a warrant"); *City of Seattle v. Altschuler*, 766 *P.*2d 518 (Wash. Ct. App. 1989) ("*Santana*'s facts limit its application to the 'hot pursuit' of a fleeing felon.").

80 *L.Ed.*2d 732. *Welsh*, however, did not involve the question of "hot pursuit." *Id.* at 753, 104 *S.Ct.* at 2099, 80 *L.Ed.*2d at 745. In *Welsh*, the Court held that the fourth amendment prohibited police from making a warrantless night entry into a home to arrest defendant for the violation of a "nonjailable" traffic offense. *Id.* at 754, 104 *S.Ct.* at 2093, 80 *L.Ed.*2d at 746. In *Welsh*,

> [s]hortly before 9 o'clock on the rainy night of April 24, 1978, a lone witness, Randy Jablonic, observed a car being driven erratically. After changing speeds and veering from side to side, the car eventually swerved off the road and came to a stop in an open field. No damage to any person or property occurred. Concerned about the driver and fearing that the car would get back on the highway, Jablonic drove his truck up behind the car so as to block it from returning to the road. Another passerby also stopped at the scene, and Jablonic asked her to call the police. Before the police arrived, however, the driver of the car emerged from his vehicle, approached Jablonic's truck, and asked Jablonic for a ride home. Jablonic instead suggested that they wait for assistance in removing or repairing the car. Ignoring Jablonic's suggestion, the driver walked away from the scene.
>
> A few minutes later, the police arrived and questioned Jablonic. He told one officer what he had seen, specifically noting that the driver was either very inebriated or very sick. The officer checked the motor vehicle registration of the abandoned car and learned that it was registered to the petitioner, Edward G. Welsh. In addition, the officer noted that the petitioner's residence was a short distance from the scene, and therefore easily within walking distance. [*Id.* at 742, 104 *S.Ct.* at 2093-94, 80 *L.Ed.*2d at 738.]

On these facts, without obtaining a warrant, the police proceeded to defendant's home where they gained entry into his house after defendant's stepdaughter answered the door.[7] They found defendant naked in bed and arrested him for driving while intoxicated in violation of Wisconsin law. *Id.* at 743, 104 *S.Ct.* at 2094, 80 *L.Ed.*2d at 738-39. He was then taken to the police station, where he refused to submit to a breathalyzer test. *Ibid.* Defendant subsequently filed a request for a state law hearing to determine whether his refusal to submit to a breathalyzer test was "reasonable" on the basis that his arrest was unlawful.[8] *Id.* at 746-47, 104 *S.Ct.* at 2095-96, 80 *L.Ed.*2d at 741-42. The Supreme Court of Wisconsin held that "exigent circumstances" justified the warrantless arrest, including "the need for 'hot pursuit' of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent destruction of evidence." *Id.* at 748, 104 *S.Ct.* at 2096, 80 *L.Ed.*2d at 742.

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[7] Due to the procedural posture of the case, the Court assumed that no valid consent existed to enter petitioner's home. *Id.* at 743 n.1, 104 *S.Ct.* at 2094 n.1, 80 *L.Ed.*2d at 739 n.1.

[8] The parties in *Welsh* did not dispute that under Wisconsin law refusal to submit to a breathalyzer test would be "reasonable" if the test were the product of an unlawful arrest. *Id.* at 745, 104 *S.Ct.* at ___, 80 *L.Ed.*2d at 740. Before the hearing was held, however, defendant was charged in a separate but related criminal complaint with driving while intoxicated. *Id.* at 746, 104 *S.Ct.* at ___, 80 *L.Ed.*2d at 741. He moved to dismiss the complaint, relying on his argument that the underlying arrest was unlawful. The trial court upheld the complaint on the ground that the co-existence of probable cause and exigent circumstances justified the warrantless arrest. The same trial court subsequently ruled, in the refusal hearing, that defendant's arrest was lawful and that his refusal to take the breathalyzer test was therefore unreasonable. As a result, defendant's driver's license was suspended for sixty days. The Washington Court of Appeals reversed, finding that the State had not demonstrated exigent circumstances sufficient to effect a warrantless arrest of defendant in his home. *Id.* at 746-47, 104 *S.Ct.* at 2095-96, 80 *L.Ed.*2d at 741.

In *Welsh*, the Supreme Court reversed, observing that the State had failed to justify the warrantless arrest on the ground of exigent circumstances. The Court further noted that it "ha[d] recognized only a few such emergency conditions," and had actually applied only the "hot pursuit" doctrine to justify in-home arrests. *Id.* at 750, 104 *S.Ct.* at ___, 80 *L.Ed.*2d at 743. The Court deemed it significant that the "underlying offense for which there is probable cause to arrest is relatively minor,"[9] reasoning that

> [b]efore agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate. [*Id.* at 750, 104 *S.Ct.* at 2098, 80 *L.Ed.*2d at 743. (citations omitted).]

The Court noted that "lower courts have looked to the nature of the underlying offense as an important factor to be considered in the exigent circumstances calculus," *id.* at 751, 104 *S.Ct.* at 2098, 80 *L.Ed.*2d at 744, and concluded that "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the

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[9] The court held that given Wisconsin's limited "interest" in precipitating an arrest for DWI based upon its classification for first-time offenders as a "noncriminal, civil forfeiture offense for which no imprisonment is possible," "a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id.* at 754, 104 *S.Ct.* at 2100, 80 *L.Ed.*2d at 746.

Fourth Amendment when the underlying offense is extremely minor." *Id.* at 753, 104 *S.Ct.* at 2099, 80 *L.Ed.*2d at 745.

Finally, the Court treated the question of "hot pursuit" as distinct from the issue of "exigent circumstances." The Court observed:

> The State attempts to justify the arrest by relying on the hot pursuit doctrine, on the threat to public safety, and on the need to preserve evidence of the petitioner's blood-alcohol level. On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. [*Ibid.* (emphasis added).]

III.

The State urges that we uphold the warrantless arrest of Bolte because Officer Liss was in "hot pursuit" of Bolte and because of the potential destruction of evidence, that is, the dissipation of defendant's blood-alcohol content. We reject the first contention and hold that "hot pursuit" alone is an insufficient justification for the warrantless arrest in this case. Nor can the arrest be sustained on the basis of the potential destruction of evidence because, as the State conceded before the Appellate Division, 225 *N.J.* Super. at 339, Officer Liss did not have probable cause when he entered Bolte's home to believe that Bolte had been driving while intoxicated.

The State's reliance on *Warden v. Hayden*, *supra*, 387 *U.S.* 294, 87 *S.Ct.* 1642, 18 *L.Ed.*2d 782 (1967), is misplaced. In *Warden*, the Court upheld a warrantless search of a private residence where "[t]he police were informed that an armed robbery had taken place, and that the suspect had entered [the residence] less than five minutes before they reached it." *Id.* at 298, 87 *S.Ct.* at 1646, 18

*L.Ed.*2d at 787.[10] In that context, the Court maintained that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298-99, 87 *S.Ct.* at 1646, 18 *L.Ed.*2d at 787. The Court held that "[t]he permissible scope of the search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." *Id.* at 299, 87 *S.Ct.* at 1646, 18 *L.Ed.*2d at 787.

The Court in *Warden* was concerned with the danger that defendant, a suspected armed felon, posed to the police and public, including those people who may have been present in the house when defendant attempted to seek refuge there. In the present case, the State may claim no similar danger to either the police or the public, particularly *after* Bolte entered his home. There was no indication at that point that Bolte posed a danger to anyone, and nothing in the record suggests that Bolte was prepared to leave the house to resume his erratic driving behavior.

The Supreme Court's decision in *Santana* does not support the State's position. *Santana* involved the warrantless search of a home following an undercover police officer's arrangement of a drug purchase from a third party. There was substantial evidence that Santana was engaged in heroin distribution and was the source of the undercover drug purchase. The defendant in *Santana* was apprehended when she retreated into the vestibule of her home after police officers approached her outside her residence. Because the underlying offense in *Santana* was a felony, its application to cases involving minor offenses is question-

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[10] Significantly, the Court in *Warden* noted that "the seizures occurred prior to or immediately contemporaneous with Hayden's arrest as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived." *Id.* at 299, 87 *S.Ct.* at 1646, 18 *L.Ed.*2d at 787.

able. *See, e.g., Welsh v. Wisconsin, supra,* 466 *U.S.* 940, 104 *S.Ct.* 2091, 80 *L.Ed.*2d 732; *United States v. Aquino, supra,* 836 *F.*2d 1268. More importantly, the facts of *Santana* support a compelling emergent circumstance, the threatened destruction of the narcotics. Thus, while *Santana* and *Bolte* arguably share the characteristic of "hot pursuit," the resemblance ends there. *Bolte* involves neither the additional circumstance of the potential destruction of evidence nor the alleged commission of a felony.

The State also relies on *State v. Davis,* 204 *N.J. Super.* 181 (App. Div. 1985), certif. denied, 104 *N.J.* 378 (1986). In that case the court upheld a warrantless in-home arrest where the defendant was initially pursued by the victim of an attempted armed robbery. The police took up the pursuit within minutes and, with help from an eyewitness, followed defendant to his door. The court upheld the warrantless arrest on the grounds of "hot pursuit" ("[a]fter the initial pursuit by the victim, the police within minutes took up this pursuit which led to defendant's door"); and "exigent circumstances" ("under the circumstances [f]or the police merely to have guarded the premises while a warrant was obtained would have potentially placed the police and other citizens in danger, since defendant then would have had time to rearm himself or to fortify his position"). *Id.* at 184. *Davis,* however, is distinguishable from *Bolte,* because *Davis* involved a felony, as well as the significant "exigent circumstances" of concern for the public safety. *Cf. State v. Cooper,* 211 *N.J. Super.* 1 (App. Div. 1986), (warrantless entry justified where statute provided that juvenile may be taken into custody without warrant for delinquency or when necessary to protect juvenile's health and safety, police officers pursued juvenile, and on arrival outside apartment, exigent circumstances arose).[11]

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[11] Both parties have cited a number of state cases in support of their respective positions. In *State v. Penas,* 263 *N.W.*2d 835 (Neb. 1978),

In our view, the disposition of this case is significantly influenced by *Welsh v. Wisconsin*, *supra*, where the Supreme Court held that the fourth amendment prohibited

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defendant was charged with driving while intoxicated, a third offense, and with resisting arrest. *Id.* at 836. The court in *Penas* held that the warrantless in-home arrest of the defendant was supported by the "hot pursuit" exception. *Id.* at 837. In *Penas* the police observed defendant through his front door, noticed that "his eyes were bloodshot, red in color," and detected alcohol on his breath. *Id.* at 836. Thus, the police had probable cause to believe defendant had been driving while intoxicated. See also *People v. Keltie*, 196 *Cal. Rptr.* 243, 247-48 (1983) (warrantless home arrest following alleged hit and run justified by exigent circumstance of destruction of evidence where police had probable cause to believe that defendant was under the influence of alcohol when the accident occurred).

In *State v. Niedermeyer*, 617 *P.*2d 911 (Or. Ct. App. 1980), *cert.* denied, 450 U.S. 1042, 101 *S.Ct.* 1761, 68 *L.Ed.*2d 239 (1981), an Oregon court held that "hot pursuit" justified a warrantless entry into the defendant's home. Defendant was a suspect in a shooting. The police obtained defendant's address from his automobile registration and subsequently staked out the house. When defendant returned home, "defendant jump[ed] out of his car. * * * The officer called for defendant to stop, but he ran into the house." After defendant appeared near the open doorway to ask what was going on, the two officers entered the house looking for other people and a weapon. *Id.* at 912-13. In *Niedermeyer*, as in *Santana* and *Davis*, "hot pursuit" was coupled with the officers' concern for their own safety and the safety of others in the arrest of a suspected felon.

In *City of Seattle v. Altschuler*, 766 *P.*2d 518 (Wash. Ct. App. 1989), defendant ran a red light. Officers pursued him in a patrol vehicle with their emergency lights on. One block past the red light, the officers approached him, and using their sirens, spotlights, and public-address system, attempted to force defendant to stop. Defendant continued to drive at a moderate rate of speed until he reached his home approximately ten blocks from the intersection where he ran the red light. *Id.* at 519. Defendant entered his home through the garage and the police officer followed. The officer arrested defendant in his home and subsequently charged him with resisting arrest, refusal to stop, and running a red light. Defendant testified that the light at the intersection was green and that he had been unaware that the police were trying to stop him. *Ibid.* The Washington Court of Appeals held that although

police from making a warrantless night entry of a suspect's home to arrest him for the violation of a minor traffic offense. 466 *U.S.* at 754, 104 *S.Ct.* 2093, 80 *L.Ed.*2d at 746. Although the police officer in *Welsh* was not in "hot pursuit" of the defendant, the critical factor in the Supreme Court's decision was that driving while intoxicated was a "nonjailable" offense, which, under Wisconsin law, was treated as a noncriminal violation subject to a civil forfeiture proceeding for a maximum fine of $200. *Id.* at 746, 104 *S.Ct.* at 2095, 80 *L.Ed.*2d at 740-41.[12] Endorsing a "common-sense" approach in determining whether exigent circumstances exist that would justify a warrantless entry into a home, the Court focused on "the gravity of the underlying offense for which the arrest is being made." *Id.* at 753, ___ *S.Ct.* at ___, 80 *L.Ed.*2d at 745. The Court noted:

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"hot pursuit" was involved, "there [were] no other factors indicating exigent circumstances sufficient to justify" the warrantless arrest in the home. *Id.* at 521. Because the arrest in the home was unlawful, defendant's conviction of resisting arrest could not stand. *Ibid.* The court observed that "[t]he mere fact that [defendant] did not stop his car, without more, does not satisfy the exigent circumstance requirement that would allow government agents to invade the sanctity of the home." *Id.* at 520. In response to the City's argument that defendant was driving a car and could leave at any time, the court responded that "the home itself could have been watched, while the usual warrant or a telephone warrant was obtained." *Ibid.*

[12] Welsh was charged with a criminal misdemeanor because it was his second citation for DWI within a five-year period. A second offender under the Wisconsin statute could be punished by imprisonment for up to one year and a maximum fine of $500. *Id.* at 746 & n.6, 104 *S.Ct.* at 2095 & n.6, 80 *L.Ed.*2d at 740-41 & n.6. The Court, however, treated the case as one in which petitioner was subject to the civil penalty as a first offender because "the police conducting the warrantless entry of his home did not know that the petitioner had ever been charged with, or much less convicted of[,] a prior violation for driving while intoxicated. *Id.* at 746-47 n.6, 104 *S.Ct.* at 2096 n.6, 80 *L.Ed.*2d at 741 n.6.

> Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see Payton, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed. [*Id.* at 753, 104 *S.Ct.* at 2099, 80 *L.Ed.*2d at 745.]

The State's concession before the Appellate Division that Officer Liss lacked probable cause, when he entered the house, to believe that Bolte was driving while intoxicated, 225 *N.J. Super.* at 339, requires us to view this case in the context of *Welsh*'s holding that an arrest for a "minor offense" can rarely support a finding of exigent circumstances sufficient to justify a warrantless home entry. Absent probable cause to believe *Bolte* was intoxicated, the officer's pursuit could be justified by his observation that Bolte had probably committed a number of motor vehicle offenses, including reckless driving, *N.J.S.A.* 39:4-95, speeding, *N.J.S.A.* 39:4-99, failure to maintain a single lane, *N.J.S.A.* 39:4-88b, as well as eluding, *N.J.S.A.* 2C:29-2b, and resisting arrest, *N.J.S.A.* 2C:29-2a. The last two violations are disorderly persons offenses and the others are motor vehicle infractions. We hold that these offenses, individually and in the aggregate, are within the category of "minor" offenses held by the *Welsh* Court to be insufficient to establish exigent circumstances justifying a warrantless home entry.

Nor does the fact that Officer Liss was in "hot pursuit" of defendant remove this case from the ambit of *Welsh*. We reject the State's contention that hot pursuit alone can support a warrantless entry into a home. Although the State argues that citizens should not be encouraged to elude arrest by retreating into their homes, the question whether hot pursuit by police justifies a warrantless entry depends on the attendant circumstances. The majority

opinion in *Welsh* observes that the State's "claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime," *id.* at 745, noting further that since *Welsh* was at home and had abandoned his car, "there was little remaining threat to the public safety." *Ibid.* We read *Welsh* as leaving open the question whether hot pursuit by police of one who, although having committed only minor offenses, poses a serious threat to the public safety while attempting to elude the police, has created an exigent circumstance sufficient to support a warrantless home entry. To a substantial extent that was the point of Justice White's dissent in *Welsh*, expressed in a factual context not involving hot pursuit:

> The gravity of the underlying offense is, I concede, a factor to be considered in determining whether the delay that attends the warrant-issuance process will endanger officers or other persons The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately. But *if, under all the circumstances of a particular case, an officer has probable cause to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer or other persons or will result in the suspect's escape, I perceive no reason to disregard those exigencies on the ground that the offense for which the suspect is sought is a "minor" one.* [*Id.* at 759, 104 *S.Ct.* at 2102-03, 80 *L.Ed.*2d at 749 (White, J., dissenting) (emphasis added).]

Although the facts in this record do not demonstrate that there was a serious threat to public safety in the course of Officer Liss' pursuit of defendant, we do not regard *Welsh* as precluding application of the "exigent circumstances" exception in such a factual context. Ob-

viously, less intrusive measures should be used whenever possible including, as the Appellate Division suggested, an attempt at a consensual entry or a telephonic warrant. 225 *N.J. Super.* at 341. If such measures fail, and if the threat to public safety is substantial, the "hot pursuit" of a defendant who poses a threat to public safety may in certain contexts constitute an exigent circumstance sufficient to support a warrantless home entry under current United States Supreme Court decisions.

The judgment of the Appellate Division is affirmed.

Justices Clifford, Handler, Pollock, O'Hern, and Garibaldi join in this opinion. Chief Justice Wilentz did not participate.